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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 467

AYRSHIRE COLLIERIES CORPORATION,
A CORPORATION, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

No.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE TO AFFIRM.

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MAY IT PLEASE THE COURT:

The motion to affirm the decree of the District Court, filed by the appellee, the United States of America, is predicated on the charge that the appeal presents no substantial

questions. Appellee prefaces its argument by a statement of "history of the rates involved" which contains several inaccurate and misleading statements. We will refer to such errors later in this brief.

We will discuss the propositions urged by appellee. We will also discuss questions involved in this appeal which are not referred to by appellee.

The pertinent provisions of the Interstate Commerce Act and Section 47 of Title 28, U. S. Code, are attached to this brief as Appendix A, *infra*, pp. 33-38.

I.

Two Members of a Statutory Three-Judge Court Cannot Determine a Case Pending Before Such Court When the Third Member Is Unable to Participate in Such Determination.

The above causes came on for final hearing on the merits before a duly constituted three-judge court on April 22, 1946. Judge Evans became ill subsequent to the hearing and did not participate in the determination of the causes. The findings of fact, conclusions of law and judgment in these cases were made and entered by Judges Major and Igoe. These facts appear from the marginal note on the first page of the findings of fact, as follows:

> "Judge Evan A. Evans became ill subsequent to the hearing of these causes and he is and has been unable to participate in a determination thereof. The findings of fact, conclusions of law and judgment have therefore been entered by the remaining judges of such court."

Appellee argues that because the decision is concurred in by a majority of the three judges, two of the judges may proceed in the absence of the third to a determination and

disposition of the causes. It cites no case to sustain this position.

The applicable provisions of the statute, 28 U. S. C. 47, *infra*, pp. 37-38, are as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

The provision that the application shall be heard and determined by three judges, with a majority concurring in the decision, would be nullified if appellee's contention were adopted. The determination of the case by three judges imports a joint consideration of the case by all three of the judges. Such consideration would involve an exchange of views and a discussion of any conflicting ideas by three judges, not by two. To permit two judges acting alone to decide a case nullifies the statutory purpose of securing the benefit of joint consideration and determination of three judges.

The statute provides that at least one of the three judges shall be a circuit judge. Appellee's contention would nullify this provision in cases where the circuit judge became disabled and two district judges determined and decided the case. The provision that at least one member of the three-

judge court shall be a circuit judge, supports our contention that the hearing and determination be by all three members, because it is to be presumed that Congress intended the statutory court to have the benefit of the experience of the circuit judge as a reviewing judge.

The statute provides for hearing and determination by three judges. Each phase is equally important. A hearing by three judges, and determination by two, is more inconsistent in actual practice with the intent of the statute than a hearing by two judges and a determination by three. Yet it is doubtful that anyone would urge that a hearing by two judges would satisfy the statute.

We have been unable to find any decision in which this precise question was involved, but there are several decisions that involve similar questions, and they lead to the conclusion that the two judges, acting alone and without the benefit of the views of the other member of the three-judge court, had no authority to determine these cases, or enter a final decree therein.

In the case of *Cumberland Telephone & Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U. S. 212, 216-217, a statutory three-judge court had denied an application for an injunction against an order of the Louisiana Public Service Commission. On application of the complainant, one member of the court entered an order granting a supersedeas and continuing the original restraining order until the appeal from the final decree could be determined. There the Court said (pages 216 and 217):

> "The wording of the section (Sec. 266 of the Judicial Code) leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court * * * a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure.

> • • • We are of the opinion that a single judge has no power, in view of Sec. 266, to affect the operation of the Court constituted by the three judges granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result which Congress was at great pains to avoid."

In the cited case the judge granting the stay stated that one of the other judges concurred in so doing. This Court said with respect thereto (page 218):

> "This statement does not make the order here in question the act of the three judges. Judge Bryan's letter • • • was a mere expression of opinion that Judge Foster as District Judge had the power to grant the injunction, an opinion with which we do not agree. • • • Nor is there any showing that Judge Clayton took part in the matter. A discussion in conference of the judges as to the granting of an injunction pending an appeal before it was applied for does not supply what is needed to give efficacy to such order by a single judge. Compliance with the statute requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct. • • • We have no proper evidence of the participation of the three judges in the injunction here and therefore grant the motion to set it aside as void and made without jurisdiction."

Section 266 of the Judicial Code (28 U. S. C. 380) is substantially the same as the provisions of the statute governing proceedings to enjoin an order of the Interstate Commerce Commission (28 U. S. C. 47). In both there is a provision for hearing and determination by three judges, with a majority concurring in the order. See *Virginian Railway Co.* v. *United States*, 272 U. S. 658, at 672.

In *Ryan* v. *Pennsylvania Public Utility Commission*, 44 Fed. Supp. 912, 914, upon application to a statutory court for an injunction pending appeal, it is said:

> "The court which heard the case at bar on its merits, however, cannot sit to hear the plaintiffs' application for an injunction pending an appeal because one of its members was commissioned as an officer in the United States Army on March 26, 1942 and is not available."

In *Dohany* v. *Rogers, State Highway Commissioner*, 281 U. S. 362, the Court held that a decree of a statutory three-judge court signed by one judge, which recited that (p. 369) "the court * * * being fully advised in the premises, do now here order, adjudge and decree", showed action of the three judge court—not just the action of one judge. This decree was supported by an opinion signed by two of the judges and a concurring opinion signed by the third judge, of which the Court said (p. 370): "This we think equivalent for that purpose to an announcement in open court, three judges sitting."

We submit that not only is the question of the power of two judges acting alone to determine these cases substantial, but the statute and decided cases show no such power existed.

II.

The Question of Whether or Not the Order of the Commission to Remove Unjust Discriminations in the Present Rates Is Supported by Findings of Fact and Evidence Is Substantial.

This question is mentioned by appellee but, while important, is not fully discussed.

The conclusions of law filed in the District Court state:

> "2. The Commission's report and order dated July 9, 1945, were made within its statutory authority and are supported by adequate findings of fact.

"3. The findings of the Commission as set forth in the report and order of July 9, 1945, have substantial support in the record made before the Commission and afford a rational basis for its conclusions."

The order of the Commission of July 9, 1945 requires carriers, according as they participate in the transportation—"(1) to cease and desist from practicing the unjust discrimination under Section 2 of the Interstate Commerce Act and the undue prejudice and preference under Section 3 (1) of said Act, found in said report to exist, and (2) to publish, maintain, and apply rates and charges that will avoid and remove said unjust discrimination and undue prejudice and preference."

Throughout this brief the reference to "present rates" is to the rates in effect at the time of the filing of the tariffs suspended by the Commission, and continuing in effect during the hearing before the Commission.

Section 2 of the Interstate Commerce Act (hereinafter referred to as the "Act"), *infra*, p. 33, provides as follows:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The Commission has repeatedly interpreted this section as applying only where a like kind of traffic is transported

for two shippers from the same origin to the same destination over the same line or route under substantially similar circumstances and conditions. *Petroleum Rail Shippers' Assn.* v. *Alton & S. R.*, 243 I. C. C. 589, 639; *Petroleum Between Washington, Oregon, Idaho, and Montana*, 234 I. C. C. 609, 648.

This interpretation has been sustained by this Court: see *Barringer & Co.* v. *United States*, 319 U. S. 1, at pages 6 and 8, where it is said:

> "Section 2 is aimed at the prevention of favoritism among shippers. * * * But differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar.' "

Further, at page 9:

> "We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. * * * The distinction between those cases and this is that here *the difference in the service charge is made between through shippers over different routes*, and is based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination." (Emphasis supplied.)

The Commission here made twenty major findings of fact. (263 I. C. C., at pages 213 through 217.) Nowhere in those findings is it stated that any coal from any origin point to any destination was being charged a higher rate than other coal from the same origin point to the same destination moving over the same line under substantially similar circumstances and conditions. Finding No. 4 of the Commission does not state any facts that would constitute a

violation of Section 2 of the Act. The finding shows on its face that there are 30 origin points in the Brazil group and 31 origin points in the Linton group; that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee") serves but four of the origins in the Brazil group and nine in the Linton group. Nowhere does it appear that the origins served by the Milwaukee are served by any other carrier, and it is not so stated. The language of the Commission in the case of *Petroleum Between Washington, Oregon, Idaho and Montana*, 234 I. C. C. 609, at page 648, is applicable here:

> "Complainants say that the disparities against them resulting from the present and proposed rates from the northern Montana points constitute the violation of Section 2 alleged in their complaint without particularity. *However, their traffic does not originate at the same points as that of their competitors, and therefore Section 2 does not apply.*" (Emphasis supplied.)

The evidence affirmatively shows that the Milwaukee rates, where lower than those of other carriers serving origins in the Brazil and Linton groups, are via the single-line of the Milwaukee from origin to destination, while the rates in which the Milwaukee joins from origins in those groups on the lines of other carriers to such destinations are via two or more lines of railroad. In many instances the hauls via such joint-line routes are 50 or 100 miles longer than via the single-line routes of the Milwaukee.

The evidence shows that these so-called groups cover a large area. The origins within the groups are frequently many miles apart. The short tariff route distance from West Clinton to Rockford is 228 miles via the single-line of the Milwaukee; the short tariff route distance from Cedar Point on the Pennsylvania Railroad to Rockford is 283 miles, a difference in haul of 55 miles. To St. Charles, Illinois, from West Clinton the single-line haul of the

Milwaukee is 179 miles; the short tariff route distance via the Pennsylvania from Centre Point is 295 miles, a difference of 116 miles.

The findings of the Commission do not support Conclusion No. 1 (263 I. C. C. at pages 217-218), that—

> "The present rates * * * from Indiana to the northern Illinois destinations * * * result * * * in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee or Illinois Central railroads, in violation of section 2 of the Act * * * to the extent such rates reflect * * * rate relations between such districts and the points in each of those districts to the respective destinations which differ from the relations reflected by the rates and rate bases set forth as approved in this report, including appendices A and D hereto."

The report states that the foregoing conclusion is based upon the major findings of fact. It is clear that the twenty findings of fact do not support that conclusion. The statement that, "The transportation conditions under which coal moves from Indiana and Illinois groups to those northern Illinois destinations are sufficiently similar to require the use of the same rate basis from all such groups," is not a finding that the circumstances and conditions under which coal moves from a point on the Milwaukee in the Brazil group to St. Charles or Rockford, Illinois, are substantially similar to the circumstances and conditions under which coal moves from a point on the New York Central Railroad in the Brazil group to St. Charles or Rockford. Such a finding could not be made because no witness testified regarding the circumstances and conditions under which coal, if any, moves from any point on the New York Central to any destination.

The question here presented is one of law. Do the facts found by the Commission constitute a violation of Section

2 of the Interstate Commerce Act? As above shown, the Commission and this Court have heretofore ruled that they do not. There is the further question of whether or not the facts found by the Commission are supported by substantial evidence.

Inherent in the decisions of the Commission and District Court on the subject of discrimination, is the power of the Commission in a proceeding such as I. & S. Docket No. 5139, to treat the thirty origin points in the Brazil group, four of which are served by the Milwaukee, five by the B. & O., ten by the C. & E. I., three by the New York Central, seven by the Pennsylvania, and one by the Indiana Railroad, as one point of origin, and to compel each of those carriers to charge the same rate from each of said origins. This Court in the case of *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 294 U. S. 499, at page 506, held to the contrary.

Appellee's erroneous definition of a "group" appearing in the margin of its motion to affirm may have led it to assume that a group was equivalent to a single origin point. A group in the midwest coal adjustment is the result of competing carriers serving mines in a fairly large area competing with one another by meeting the lowest rates of a competitor to important destinations. That the competing carriers do not universally meet these competitive rates is shown by the evidence herein. (See Exhibit 3, Part V, of the record before the Commission). It appears that sometimes the carriers serving a group of origins will all publish the same rate to some destinations; at other destinations most of the carriers will publish the same rate, while others will publish higher or lower rates; and some do not publish any specific rates.

We submit that the question raised with respect to the order of the Commission pertaining to unjust discrimina-

tion under Section 2 of the Interstate Commerce Act, which order was approved by the District Court, is material and substantial, and one which the parties hereto are entitled to have determined by this Court.

We have discussed the lack of evidence of and findings of facts regarding the present rates that as a matter of law would constitute a violation of Section 2 of the Act; the same lack of findings of fact and evidence in this regard exists with respect to the proposed rates.

III.

The Question of Whether or Not the Order of the Commission to Remove Undue Preference and Prejudice in the Present Rates Is Supported by Findings of Fact and by Evidence Is Substantial.

This question is not discussed fully in the motion to affirm. The discussion is confined to the claim that there is no finding or evidence that the Milwaukee has effective control over the joint-line rates in which it participates in moving coal from mines on other carriers, and to the failure of the order to afford the alternative to the carriers of increasing the rates of the Milwaukee or reducing the rates of the other carriers or a combination of the two.

The report of the Commission contains no finding, statement or even an intimation that the Milwaukee has any control over the rates published by any other carrier from mines in any Indiana group to any destination. The evidence is equally barren of any such statement. Such a finding is essential to sustain the order, and the District Court erred in not so holding. In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at page 646, it is said:

> "Where * * * a carrier whose lines reach, or which controls the rate to, one of the destinations, is

a party to a joint rate to the other but can not make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it. * * * Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them."

Here there is no evidence and no finding that any carrier serving an Indiana group controlled the single-line rates of the Milwaukee from mines on its line in Indiana to destinations on its lines in Illinois. Likewise, there is no evidence or finding that the Milwaukee in any way controlled the rates published by the C. & E. I., the New York Central, the Pennsylvania or any other carrier serving mines in Indiana to Rockford or other destinations on the line of the Milwaukee in Illinois. If the Milwaukee withdrew its participation in the joint-line rates, the difference between its single-line rates to Rockford and the joint-line rates to Rockford via other delivering carriers would still exist. Appellees contention is contrary to the decision of this Court in the *Texas & Pacific* case cited and quoted above.

No effort is made by appellee to explain the lack of findings and evidence that the single-line rates of the Milwaukee unduly preferred the shippers on the Milwaukee and prejudiced those served by other carriers in the Indiana groups. The Commission has long recognized that a mere disparity in rates does not establish undue preference and prejudice. To be undue, preference and

prejudice must be a source of advantage to the party or locality alleged to be favored and a detriment to the other party or locality. See *Chicago Live Stock Exchange* v. *Abilene & Southern Ry. Co.*, 223 I. C. C. 141, at page 152; *A. E. Staley Mfg. Co.* v. *B. & O. R. Co.*, 262 I. C. C. 352, at page 356. This rule of law has been stated by this Court in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, at page 521, and in other cases.

The Commission has made no finding that the single-line rates of the Milwaukee prevented any shipper served by another carrier in Indiana from shipping coal. It has made no finding that any coal producer served by any other carrier in Indiana would ship more coal if the lower single-line rates of the Milwaukee were increased or cancelled. No witness testified on that subject. The truth is that the single-line rates of the Milwaukee enabled shippers on its line to compete with coal shipped from Illinois mines on their lower rates to Rockford. Those lower Illinois rates are what prevent Indiana coal operators served by carriers other than the Milwaukee from shipping coal. The Milwaukee rate from Brazil for its 236 mile haul is the same as the rate from the Springfield group in Illinois to Rockford, for an average haul of 257 miles. The Commission's approved rates from Brazil group to Rockford are 12 cents higher than from Springfield, although the average distance from the Brazil group is 6 miles shorter than from the Springfield group. The present rates from the Brazil group via joint-line routes to Rockford are 17 cents higher than from the Springfield group. The present rates from the Southern Illinois group are only 13 cents per ton higher than the joint-line rates from the Brazil group to Rockford, while the distance from the Southern Illinois group is 112 miles greater than from the Brazil group. It is not the single-line rates of the Mil-

waukee that in any way prevent the Indiana operators, who must ship on the joint-line rates from the Brazil and Linton groups, from selling and shipping coal to Rockford and other destinations on the line of the Milwaukee in Illinois; it is the rates from the Illinois mines to those destinations.

The Commission admits there is no evidence of undue prejudice and preference in the rates from the Brazil and Linton groups to Rockford and other Illinois destinations by its statement on page 195 of its report (263 I. C. C. 179): "Under the circumstances recited an extensive showing of injury through loss of tonnage to particular coal shippers or consumers by reason of the discriminatory rates here before us is not required." But under any circumstances there must be some evidence of injury to one and benefit to another to sustain an order of prejudice and preference. The Commission has pointed to no such evidence, because there was none. The cases cited by the Commission do not sustain its statement.

The Commission precedes the above quoted statement by saying, "The transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over joint-line routes to the same destinations from other mines in the same groups." That statement is not made as a finding of fact, it is in the body of the report. It is not supported by any evidence. The transportation conditions of the Milwaukee were described in detail by witness Whalen, but no witness described or referred to the transportation conditions of any of the other carriers serving mines in the Brazil and Linton groups except the C. & E. I. Railroad. In addition to the Milwaukee, the B. & O., Pennsylvania, New York Central, C. & E. I. and Indiana railroads serve mines in the Brazil group, and the C. I. & L. (Monon), C. & E. I., Illinois Central, New York Central and Penn-

sylvania serve mines in the Linton group. With only a showing of distance, grades and curves by the C. & E. I. for its own line, and nothing as to other transportation conditions, and no showing at all as to the other carriers, the Commission erred in stating the transportation conditions via the Milwaukee and Illinois Central from Indiana do not differ materially from those via other carriers serving the Brazil and Linton groups. Appellee quotes this unfounded statement in the report as part of its argument.

The evidence shows that the transportation conditions via the single line of the Milwaukee are ideal—there is no passenger traffic over its line from the coal groups to Chicago; one engine hauls more cars than even the C. B. & Q. from Southern Illinois; its service in originating the coal is at a minimum, it has no difficult grades or curves; no interline switching is involved. The record shows nothing of these facts as to the other carriers serving Indiana, except grades, curves and the type of motive power used on the C. & E. I.

The District Court seriously erred in holding that the findings of fact sustained the order and that the evidence supported the findings of fact. We submit it is the right of appellants that this Court pass upon the question of the power of the Commission to order carriers to cease and desist from an alleged prejudice and preference in rates when there is no evidence of the facts essential to constitute an undue prejudice and preference, and there are no findings of such facts by the Commission. We further submit that this question is substantial.

What has been said above regarding the lack of findings of fact that would constitute a violation of Section 3 (1) of the Act by the present rates, is equally true with respect to the proposed rates.

It is assigned as error that the order of the Commission is invalid because it does not leave the carriers with an alternative in the removal of the prejudice and preference phase of the order. Appellee states that a complete answer to this contention is that the order was entered under Section 15 of the Act, and not under Section 3.

All orders of the Commission regarding rates are entered by virtue of Section 15 of the Act, except orders to remove prejudice and preference or discrimination caused by intrastate rates against interstate commerce, which is covered by Section 13 (4). Section 3 (1), *infra*, p. 33, declares it to be unlawful for any carrier to subject any person, locality or description of traffic to any undue or unreasonable prejudice or preference; it does not say what the Commission may do in the event a carrier violates that prohibition. The same is true with respect to Section 1 (5), which declares unreasonable charges to be unlawful, and Section 2, *infra*, p. 33, which declares unjust discrimination to be unlawful. None of those sections provide any penalty or remedy for such unlawfulness, if it exists. However, Section 13. (1), *infra*, pp. 33-34, provides for complaints against carriers violating the Act, and Section 15 (1), *infra*, pp. 35-36, provides that after hearing upon a complaint made as provided in Section 13, or after hearing under an order for investigation made on its own initiative, the Commission, if it is of the opinion the rate or charge is or will be unjust or unreasonable (Section 1 (5)), unjustly discriminatory (Section 2), or unduly preferential or prejudicial (Section 3 (1)), or otherwise in violation of the Act, is authorized and empowered to determine and prescribe what will be the just and reasonable charges, or the maximum or minimum, or maximum and minimum, to be charged, and to make an order that the carrier or carriers shall cease and desist from such violation.

It is no answer to say the order was entered under Section 15, since all orders which the Commission may make for violations of Sections 2, 3 or 13, or other provisions of the Act, are authorized by Section 15.

Appellee cites the case of *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 479, as sustaining its contention, but in that case the Commission prescribed certain minimum rates from Ohio River crossings to Youngstown in order to correct the situation found to be unlawful. The Commission under Section 15 (1) may enter such order in a proper case; it may enter such order under Section 13 (4), but in the case here involved it did not do so. The order here merely requires the carriers to cease and desist from practicing the unjust discrimination and prejudice and preference found in the report to exist, and to maintain rates that would avoid such discrimination, prejudice and preference.

The assignment of error is based on the practical effect of the order because the Milwaukee does not control the rates of the other carriers; it can not comply with the order by reducing the rates of the other carriers—it can only comply by increasing its own rates. The very fact that actually no alternative is afforded the Milwaukee shows the fallacy of appellees argument that the Milwaukee effectively controls any rates but its own single-line rates.

There are no rates prescribed by the order of the Commission. The proposed rates which were suspended are ordered to be cancelled, but without prejudice to publishing the approved rates. That is not a requirement that the approved rates be published. Surely it can not be said that that part of the order prescribed or required any minimum or maximum rates to be published and main-

tained. The decision in the *Youngstown* case is not applicable to the facts here.

IV.

The Commission Had No Authority or Jurisdiction to Order an Increase in, or Change in the Relationship of, the Present Rates From Indiana in I. & S. Docket No. 5139.

This proceeding before the Commission was initiated by the complaint of the Coal Trade Associatio of Indiana, seeking the suspension of certain new rates contained in rate schedules filed by the carriers serving Indiana mines, to Rockford and other destinations in Illinois, and to Beloit, Wisconsin. The Commission, acting upon said complaint, entered its order for investigation of the lawfulness of the rates, and for their suspension. That order recites: "* * * there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates * * * to become effective on the 2nd day of August, 1942 * * * designated as follows:" Then is listed a number of supplements to the tariffs of a number of carriers. The order proceeds:

> "*It is ordered*, That the Commission upon complaint, without formal pleading enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz: (enumerating supplements to tariffs of certain railroads, and proceeding). And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order."

The order proceeds, after reciting that said schedules make certain increases and reductions in interstate rates on coal, the rights and interests of the public appear-

ing to be injuriously affected thereby, and that the Commission is of the opinion that "the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon," it is ordered "That the operation of the said schedules contained in said tariffs be suspended," and shall not be changed pending the expiration of the period of suspension or any extension thereof. The order then assigns "this proceeding" for hearing.

Section 15 (7) of the Act, *infra*, pp. 36-37, authorizes the Commission on complaint or on its own initiative when any schedule stating a new rate is filed, to enter upon a hearing concerning the lawfulness of such rate, and pending such hearing and decision thereon, to suspend the operation of such schedule, and after full hearing to make such order with reference thereto as would be proper in a proceeding initiated after it (such new rate) had become effective.

It is clear from the provisions of Section 15 (7) that the Commission is there given power to enter upon a hearing regarding the lawfulness of new rates, and to suspend the operation of such new rates pending the hearing and decision.

It is equally clear that the Commission by its order of July 30, 1942, entered upon a hearing concerning the lawfulness of the new rates contained in the schedules in the supplements to tariffs enumerated in the order, and suspended the schedules of new rates pending the hearings. No hearing was ordered with respect to any other subject matter.

Appellee in its motion to affirm states that some of the schedules republished the existing rates. This is an incorrect statement as to any of the rates to Rockford or

other destinations in Illinois. The Milwaukee filed supplements to three tariffs. One of those supplements contained rates to Beloit—in it the Milwaukee published new rates via joint-line routes from mines in Indiana and republished its present single-line rates from mines served by it to Beloit. That is not true with regard to Illinois destinations.

Further, the order of the Commission of July 30, 1942, for the investigation and suspension of the rates uses the same language entering upon the hearing concerning the lawfulness of the rates as it does in suspending the operation of same. The hearing is "concerning the lawfulness of the rates, charges, regulations and practices stated in said schedules contained in said tariffs, viz. (Enumerating a part of those supplements previously listed), and the rates, charges, regulations and practices stated in all schedules in each of said tariffs and supplements named in this order." The suspension is "of the said schedules contained in said tariffs." If, as appellee contends, the Commission's order of July 30, 1942 included present rates, there would have existed a situation of having no lawful rates in effect, because all rates, present and proposed, would be suspended pending hearing and decision. No such intent can be attributed to the Commission. The order for investigation and suspension affected only the proposed new rates.

With respect to the one schedule that republished the present single-line rates of the Milwaukee to Beloit, the Commission in its report said:

> "To Beloit * * * the rates * * * from Brazil and Linton mines on the Milwaukee, from Princeton mines on the Southern and the Algers, Winslow & Western, and from Boonville are not here proposed to be changed and therefore are not specifically in issue in this proceeding." (263 I. C. C. 179; at 202.)

This statement shows that the hearing did not embrace the lawfulness of the present single-line rates of the Milwaukee to Beloit, even if such rates were republished in a schedule containing new rates.

Appellee cites the case of *Akron, C. & Y. Railway Co.* v. *United States*, 22 Fed. (2d) 199, 203, as sustaining the power of the Commission to increase or decrease existing rates in a proceeding under Section 15 (7) of the Act. The case is not pertinent, because there the Commission had by its order prescribed specific maximum rates on salt from Chicago, Detroit and Akron to New York. The Commission there was acting upon the proposed rates, and exercised the authority conferred on it by Sections 15 (7) and 15 (1) of the Act, viz: to enter such order respecting the new rates as it could if the proceeding had been initiated after the rates became effective (Section 15 (7)), which under Section 15 (1) it has the authority to prescribe a maximum or minimum rate or a maximum and minimum. In the *Akron* case it had exercised its power to prescribe a maximum rate in lieu of the suspended rate.

The power of the Commission in a proper case under Section 15 (7) to enter an order establishing a specific rate in lieu of the proposed rate under investigation is not questioned. The fact that such prescribed rate is different from the present rate, and so incidentally affects the present rate, does not prevent the Commission from exercising the authority granted to it by the Act. However, that situation is not present here. The Commission did not prescribe any new rates in lieu of the suspended rates. The Commission ordered that the suspended rates be cancelled; that order was a full and complete exercise of the power of the Commission. It did not affect the present rates; it fully disposed of the questions before the Commission, i. e., the lawfulness of the proposed rates.

Having disposed of the proposed rates, the Commission proceeds to enter an order directly, not incidentally, affecting the present rates. That part of the order was not within its authority in I. & S. No. 5139 to enter.

Appellee argues that strict rules of pleading and evidence are not applicable in proceedings before the Commission, it being an administrative body. The question is not one of technical pleading or of a variance between the right asserted and the right proven. The substantial objection is that the lawfulness of the present rates was not the subject matter of the hearing; the statutory authority of the Commission to act upon the present rates was never invoked by "an order for investigation and hearing" of the lawfulness of such rates; there was no hearing as to whether or not the present single-line rates of the Milwaukee were in violation of Section 2 of the Act; there was no hearing as to whether or not the present single-line rates of the Milwaukee in conjunction with the joint-line rates published by other carriers from mines in Indiana violated Section 3 (1) of the Act. There was no evidence directed to those questions. There was no evidence as to whether or not the proposed rates violated Section 3(1) of the Act in regard to the single-line rates of the Milwaukee, although several witnesses stated that it would be desirable to have uniform rates from all origins in a group to the same destination.

The cases cited by appellee in support of its contention are not applicable. For example, the case of *Alton & Southern Railroad* v. *United States*, 49 Fed. (2d) 414, 429-30, shows that there was voluminous evidence on the subject of icing charges and whether or not the line rates were sufficient to cover such charges; that the hearings before the Commission covered an extended period and the parties had opportunity to meet the issues developed in the hearing. In the case of *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 131-2, the primary

question was whether the Commission could rely on hearsay evidence received without objection. There was no question involved of an order of the Commission being entered on a subject not before it, and regarding which there was no evidence. None of the cases cited by appellee deal with the jurisdiction of the Commission in a proceeding under Section 15(7) of the Act to enter an order directed to the present rates alone, where it had ordered the cancellation of the suspended rates.

Appellee, at page 5 of its motion, makes marginal reference to certain pages of the transcript of testimony before the Commission as showing that the evidence dealt with the lawfulness of the present rates. These pages of the transcript are attached hereto as Appendix B, *infra*, pp. 39-49. In each instance but one that testimony, while mentioning present rates, was with respect to the relationship of the rates from the Indiana origin groups on the one hand and the Illinois groups on the other, evidence pertinent to the issues in Docket No. 28881. At transcript 1793-4, the witness was testifying regarding the rates to Beloit to which no change was proposed from Illinois, but where increases were proposed from Indiana, except via the single-line routes of the Milwaukee and from the Southern Railway origins; reference to the Exhibits Nos. 58 and 59 showed that the rates from Illinois produced lower ton mile earnings than the present rates from Indiana, and that the proposed rates from Indiana increased the ton mile earnings. In other words, the witness pointed out that at Beloit the average Illinois rate gave Illinois operators an advantage, which advantage would be increased by the proposed increased rates from Indiana.

That evidence does not deal with any question of whether the single-line rates of the Milwaukee were unlawful. It

was introduced to show that as between the Indiana groups and the Illinois groups the "standard differential" should be re-established to Rockford and other northern Illinois destinations in the 13th Section proceeding, Docket No. 28881. The Commission had so decided in the case of *Coal to Illinois and Wisconsin*, 232 I. C. C. 151, but because it did not there have jurisdiction over the Illinois intrastate rates, which it had in Docket No. 28881 currently before the Commission with I. & S. Docket No. 7139, the order never became effective.

Appellee, in its motion to affirm, quotes from exceptions filed by the Coal Trade Association of Indiana to the proposed report of the Examiner in an effort to show that the lawfulness of the present rates was before the Commission. Those quotations show that they dealt with the 13th Section case, Docket No. 28881, or with a combination of the two cases heard on the common record before the Commission. There we urged the Commission in its decision to restore the standard differentials as between the Indiana groups and the Illinois groups, which it was prevented from doing in its decision in *Coal to Illinois and Wisconsin*, 232 I. C. C. 151, for the reason stated above.

The Commission was hearing two cases. The position of the Indiana coal operators was that the intrastate rates in Illinois to Rockford, which had been reduced in 1930 by 17 cents per ton, without any corresponding reduction in the rates from Indiana, unduly preferred Illinois coal operators and unduly prejudiced Indiana coal operators, except those served by the Milwaukee on shipments to Rockford and other destinations in Illinois on the line of the Milwaukee. The proposed increased rates from Illinois origins substantially restored the reductions of 1930. We urged before the Commission that it had jurisdiction in the 13th Section case to correct intrastate rates, and in the Section

15 (7) case to correct the interstate rates proposed. There was evidence to sustain our contentions. That evidence dealt with the relationship of the rates from Indiana and the rates from Illinois; it did not deal with the lawfulness of the relationship between the rates from the Indiana origins, present or proposed, to these Illinois destinations.

We submit the appellants, coal operators of Indiana, are not estopped from urging the lack of jurisdiction of the Commission to enter the order here involved by anything said in any of their briefs, exceptions, or petitions before the Commission or by the evidence they introduced in the hearing before the Commission.

Appellee states we are merely seeking to have the Court substitute its judgment as to proper relationships for that of the Commission—that is not the fact. We want this Court to determine and rule that the Commission cannot enter an order that is not supported by findings of fact which in turn are supported by substantial evidence. We further want this Court to rule that where an investigation is undertaken to determine the lawfulness of proposed new rates, over a wide territory from an all coal producing area of a State, the Commission cannot enter an order cancelling said proposed new rates and also an order requiring the present rates of one carrier to a few destinations to be changed to correct alleged violations of the Act, when no one claimed such rates were in violation of the Sections of the Act referred to in the order and when there was no hearing on that subject.

We submit that the question of the authority and power of the Commission to enter an order directly affecting the present rates, after it had fully disposed of the issue before it, the lawfulness of the proposed rates, is substantial, and should be decided by this Court.

V.

There Are Substantial Questions Involved Which Are Not Discussed in the Motion to Affirm.

We have, we believe, shown that the questions involved in these appeals, which are discussed in the motion to affirm, are substantial. These appeals involve other questions which are substantial and are of importance generally as well as to the parties to these proceedings.

A.

Is the decision and order of the Commission arbitrary and capricious?

Here the distances from the Brazil group to Rockford and Beloit are somewhat shorter than from the Springfield group in Illinois, but the Commission has approved rates from Brazil 12 cents per ton higher than from Springfield. The Commission has stated that a few cents per ton frequently controls the sale of coal, yet the Commission approves rates 12 cents per ton lower from Springfield for a longer haul than from Brazil. That we submit is arbitrary and capricious, especially as the Commission states that rates from Indiana mines should be on the same level as those from Illinois mines.

The Commission approves rates from the group that average $1.95 per ton for an average distance to twelve destinations in Illinois, termed by it as representative, of 256 miles. To Rockford, the principal and most important market for coal in the whole destination area, the Commission approves rates from the Brazil group of $2.07 per ton for a haul of 251 miles. The Commission condemns as discriminatory, preferential and prejudicial the proposed single-line rate of the Milwaukee from origins on its line

in the Brazil group to Rockford of $1.95 per ton for a haul of 236 miles, but finds reasonable a rate of $1.95 per ton from Springfield for an average haul of 256 miles. Is that decision the rational conclusion to reach from the facts, or is it arbitrary and capricious?

There are numerous other instances of arbitrary and capricious results in the Commission's decision.

B.

Does the Commission have authority under the Act to require the Milwaukee to charge higher rates than it believes proper from origins served by it, because other carriers serving other origins in the same general area publish higher rates on which little or no coal moves?

C.

Does the Commission have the power to require the Southern Railway to reduce its rates from the Boonville group to the level of the rates from the Princeton group because one mine in the Princeton group, on the New York Central, is 10 miles distant across country from a mine on the Southern in the Boonville group? No evidence or claim was made that the Boonville rate is or would be unreasonable or otherwise violative of any provision of the Act; no finding was made by the Commission to that effect. The evidence shows that the haul is 40 miles longer via the Southern from mines in the Boonville group than from those in the Princeton group, and that as between the two groups the average difference in distance is 37 miles Boonville greater than Princeton. Earlier in its report the Commission approved a 10 cent differential as between mines in the Brazil and Linton groups where the difference in distance was 34 miles. Is that part of the Commission's

decision arbitrary and capricious? It is true the order did not require the carrier to publish the rate, but it approved the equality of the rates as between the two groups and stated that the cancellation of the proposed rates was without prejudice to publishing the approved rates.

D.

The Commission states in its report that it approved rates and rate bases set out in Appendixes A and D. It approved rates from each origin group in Indiana and Illinois to each of the twelve destinations in Illinois. Nowhere in the report is there any consideration of the reasonableness or lawfulness of the rates from any group to any one of the destinations. There is no discussion or finding with respect to whether or not the rates to any one of those destinations are preferential or prejudicial as between any of the groups or as between any of the destinations.

The rates and rate relationships so approved as between the various groups and individual destinations are inconsistent. For example, as between the Southern Illinois group, which has ordinarily been considered the base group in Illinois, and the Brazil-Clinton group in Indiana, which has been considered the base group in Indiana, the difference in distance from Southern Illinois and Brazil-Clinton at Belvidere, Illinois, is 170 miles, the difference in the approved rates is 18 cents per ton; to Rockford, where the difference in distance between Southern Illinois and Brazil-Clinton is 112 miles, the difference in the approved rates is 18 cents; but at Forreston, Illinois, the difference in distance is 83 miles and the difference in the approved rates 25 cents; and at Rochelle, Illinois, the difference in distance is 100 miles and the difference in the approved rates is 16 cents. Certainly, that is not the logical relationship ex-

pected of rates that are supposed to be reasonable, non-discriminatory, non-prejudicial and non-preferential. Other instances of the arbitrary and capricious character of the approved rates are as follows: to Belvidere, Illinois, the average distance from the Brazil-Clinton group is 250 miles, the approved rate is $2.07; from the Springfield group the average distance is 279 miles, the approved rate is $1.95. From the Princeton group to Belvidere the average distance is 364 miles, the approved rate $2.24, while from the Centralia, Belleville and DuQuoin groups in Illinois, the distances are 351 miles, 395 miles and 363 miles, respectively, and the approved rates $2.15. From the Southern Illinois group, for a distance of 428 miles, the approved rate is $2.25—one cent more than from Princeton. To Geneva, Illinois, for a distance from Brazil-Clinton of 217 miles, the approved rate is $1.84; from Springfield the distance to Geneva is 230 miles and the approved rate is $1.75. The average distance from all Indiana groups to Geneva is 266 miles and the average of the approved rates is $1.93. The average distance to Geneva from all the Illinois groups is 298 miles and the average of the approved rates is $1.88. Is it logical for the Commission to impose upon the Indiana operators a rate 5 cents higher for a haul 32 miles shorter than is imposed upon the Illinois operators? The Commission considered only the average of these arbitrary rates from the Illinois and Indiana groups to the whole of the twelve destinations rather than complying with the statute and determining just, reasonable and non-preferential rates to each destination from the origin groups involved.

We submit that the question of whether or not the decision of the Commission was arbitrary and capricious, under the circumstances of this case, is of vital importance not only to the parties to these proceedings but to the public generally.

E.

Inherent in this case is the power and authority of the Commission, directly or indirectly, to require all of the carriers serving various and different origin points in an area of wide extent, as one of the coal groups in either Indiana or Illinois, to charge the same rate from each of those origins via every route, irrespective of the traffic and transportation conditions on the various carriers involved and of the difference in the length of the hauls involved, merely because at some destinations those carriers think it is good business to meet the competition of another carrier by equalizing their rates with the rate of such other carrier. The Commission has characterized as a "dual basis of rates" a different rate charged by one carrier than by other carriers serving origins in the same group. This characterization is new in the language of the decisions of the Commission. It is a situation that has existed in this territory for years, both from groups in Illinois as well as in Indiana. This decision of the Commission raises a question, and it is a substantial one: can the Commission force a carrier to give up its rights to compete with carriers serving other origin groups in Illinois in order that its rates be the same as rates of carriers serving origins in the same general vicinity in Indiana?

Conclusion.

We do not know whether or not appellee's statement that it does not appear that notice of appeal was served upon the Attorney General of Indiana was intended as a basis to support the motion to affirm. The fact is that notice of the appeal was served on the Attorney General of Indiana and proof of service filed in the District Court within a few days after the allowance of the appeal.

We submit that the questions raised in this appeal are substantial; many of them have not been passed upon by this Court, and we urge that this Court accord to these proceedings a full and complete hearing.

Respectfully submitted,

Earl B. Wilkinson

Herbert A. Sa

Attorneys for Ayrshire Collieries Corporation, et al., Appellants in No. .....

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Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant in No. .....

Chicago, Illinois,
September 5, 1946.

APPENDIX A.

The Interstate Commerce Act, as amended, U. S. Code, Title 49, provides in part:

"Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"Sec. 13. (1) Any person, firm, corporation, com-

pany, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

* * *

"Sec. 13. (4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will re-

move such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

"Sec. 15. (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed,

as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * *

"Sec. 15. (7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account

in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Section 47 of U. S. Code, Title 28, provides:

"*Sec. 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made, or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other per-

sons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

APPENDIX B.

Excerpts From Transcript of Testimony, Witness Harold V. Scott Testifying on Behalf of Coal Trade Association of Indiana, Being the Pages of the Transcript Referred to on Page 5 of Appellee's Motion to Affirm.

(p. 1793)

"Q. (By Mr. Wilkinson, on direct examination.) How do the earnings under the present and proposed rates from the Illinois groups compare with those from the Indiana groups to Beloit?

"A. Referring to my exhibit marked No. 58, this exhibit shows that to Beloit from a composite of the Illinois groups the average present rate, as shown under Column 7, reflects per ton-mile earnings of 6.65 mills and the average proposed rate 6.61 mills. The earnings from the Indiana groups to Beloit are higher, as shown under Columns 12 and 13.

"Q. How do the earnings from Southern Illinois compare with the earnings from Brazil-Clinton?

"A. Referring to my exhibit which has been marked No. 60, this exhibit shows that to Beloit, the present and proposed rates from Southern Illinois reflect ton-mile earnings of 6.09 mills and the present rate from Brazil-Clinton reflects earnings of 7.78 mills. The proposed rate from Brazil-Clinton reflects ton-mile earnings of 7.78 mills from the C. M. St. P. & P. mines and 8.41 mills from other mines. Again it will be noted that the earnings from the Southern Illinois group under the present rate is considerably lower than the earnings under the present and proposed rates from Brazil-Clinton.

"The same situation is reflected in the car-mile earnings."

(p. 1794)

"Q. The testimony and exhibits that you have presented are intended to prove, are they not, that the rates and differentials as now in effect and as now proposed to the northern Illinois destinations and as now proposed to Beloit are not proper. What is the contention of the Indiana operators as to what rates would be proper?

"A. It is our contention that the rates from Indiana to destinations in northern Illinois should be on the basis of their standard differential under Southern Illinois which was in effect prior to the 1930-1932 disruption. To Beloit, it is our contention that the rates should continue in effect the differential relationship with Southern Illinois, which relationship has been in effect for many years.

"Q. Do you have an exhibit showing what these rates would be?

"A. Yes, and it has been marked Exhibit No. 72. This is a statement showing the rates that would obtain from the Indiana groups to the representative destinations in northern Illinois and Beloit, Wisconsin, and to a composite of such representative destinations based on the standard differentials between the Indiana groups and the Illinois groups.

"These rates are arrived at in the following manner: The rates proposed from Southern Illinois to these representative destinations have been taken as the base group from the Illinois group. From the base group in Indiana, the Brazil-Clinton groups the rates shown on this exhibit have been made on their standard differential of 30 cents under Southern Illinois."

(p. 1845)

Cross-Examination.

"Mr. McElroy: In other words, the Illinois Commerce Commission did not allow the increase granted by the Interstate Commerce Commission simultaneously with the publication of the interstate rates.

"Mr. Biaett: This is correct.

"Mr. McElroy: So there is a gap of about 90 days before Illinois allowed the increase.

"Mr. Biaett: Yes, that is right.

"Exam. Trezise: Well, may we have it generally understood, then, that the present rate is $1.45 from Victoria to Rockford, Illinois, and it is proposed to increase it to $1.60, is that right?

"Mr. Biaett: Via the Burlington, which is the lowest rate from Victoria to Rockford, and the rate which we have shown throughout the exhibit.

"Exam. Trezise: And that is the longest distance and has probably a longer distance than the other route, and that distance being 198.1. That is the shortest route via the Burlington and its connections, is that right?

"The Witness: Yes, sir.

"Exam. Trezise: Thank you. Do we have some further questions now?

"Mr. Zoll: I had a couple of questions, Mr. Examiner.

"Exam. Trezise: Mr. Zoll:"

(p. 1846)

"Q. (By Mr. Zoll) Mr. Scott, as I understand your testimony, you are of the opinion that the present rates from Indiana to these northern Illinois destinations are unreasonable, in violation of Section 1, is that correct?

"A. The present rates are unreasonable in violation of Section 1? Yes. Our contention is that probably the strongest—our principal contention is that they are relatively unreasonable with relation to the rates from the Illinois fields.

"Q. In relation to the present rates from Illinois?

"A. Both present and proposed.

"Q. Then the answer to my question is yes?

"A. Yes, I modified it just a little.

"Q. Well, I wonder, if that is your opinion, why you have not previously filed any complaint against the rates?

"A. The answer to that question, Mr. Zoll, is this: That these rates have practically been in constant litigation, or have been constantly—have been actively handled by the carriers and the operators since these rates were first published in 1930. I don't know of a year that has gone by since then that there hasn't been some sort of an attempt to straighten out those rates. There has been no lapse of time that we filed a complaint that is before the Commission in the thirteenth section proceeding, or an I. & S. proceeding. They were before the Commission on the rates from the Milwaukee mines, which wound up in the Supreme Court. They were always in constant—these rates were constantly being acted on or rather I should say constantly considered with the purpose of straightening them out."

(p. 1847)

"Q. What was in my mind was this, that a statement that you believed the rates from Indiana unreasonably doesn't carry as much weight with me as it might, in view of the fact that you never bothered to do anything about it.

"A. I think if you will check the record in I. & S. Docket 4368, in which the carriers proposed to reestablish the normal differentials from the Brazil-Clinton group to most of these northern Illinois destinations but did not propose to do it from the Princeton-Ayrshire and Boonville group, you will find Indiana operators were very active in that proceeding, and were successful in that proceeding.

"Q. I understood you to say that the present rates from Indiana were unreasonable.

"A. Yes.

"Q. As they are today, and would continue to be so if these rates were not proposed in this I. & S. case.

"A. I don't quite—if these rates were not proposed. We don't agree with the proposed rates either, of course.

"Q. No. You think that the present rates from Indiana violate Section 1?

"A. Yes.

"Q. They are excessive? And they have done that for some years, I gather?

"A. Yes."

(p. 1848)

"Q. All right. It is also your opinion, then, also that the present and proposed rates from the Illinois mines violate Section 13 of the Act?

"A. Present rates from the Illinois and Indiana mines violate Section 13 of the Act. Yes, if I have stated your question right.

"Q. Well, I will put it this way: Is it not your opinion, as I read your testimony, that the present as well as the proposed rates from the Illinois mines are unduly low, in violation of Section 13?

"Mr. Morgan: I object. That is a legal conclusion.

"Mr. Zoll: No, it is not a legal conclusion. I am asking the opinion of this witness.

"Mr. Morgan: The witness is not a lawyer.

"Mr. Zoll: I didn't ask him if he is a lawyer.

"Exam. Trezise: I think we will let him answer this.

"Q. (By Mr. Zoll) I just wanted to know, Mr. Scott, what your opinion was. As I read Part 2 of your proposed statement, that is the impression I get of your position.

"A. That the rates from Illinois, both the present and proposed rates from Illinois, are in violation of Section 13?

"Q. Yes, sir.

"Mr. McElroy: He asked you if they were unduly low, in violation of Section 13.

"The Witness: They are—"

(p. 1849)

"Exam. Trezise: Well, about this violation of Section 13, I think that is objectionable. I will go along with you on that.

"Mr. Zoll: Well, I just call attention to the fact that the witness stated it on his direct.

"Exam. Trezise: Giving his opinion about the rates, yes.

"Mr. Wilkinson: I think you will find page 2 just states the contention and does not give an opinion; the contention we are making, which we trust the evidence supports.

"Q. (By Mr. Zoll) Well, you don't know offhand what your contention—

"Mr. Wilkinson: The objection has been sustained to your question.

"Mr. Zoll: I didn't understand so.

"The Witness: If I can have the question again—

"Q. (By Mr. Zoll) Your contention at the present time—

"Mr. Morgan: The objection has been sustained.

"The Witness: You are asking me to answer that and I don't know whether it has been objected to or not.

"Mr. Zoll: Let's start over.

"Q. (By Mr. Zoll) Do you contend that the present rates from the Illinois mines to these Illinois destinations are unreasonable?

"Mr. Morgan: If he knows."

(p. 1850)

"Mr. Zoll: I am merely asking for his position. I want to know what he is contending. Certainly there is nothing objectionable to that.

"Exam. Trezise: All right. That is his contention.

"The Witness: My contention is that the present rates from Illinois to these destinations are unreasonably low with relation to the rates from the Indiana fields.

"Q. (By Mr. Zoll) They must be unlawful, then?

"A. Yes.

"Mr. Cardy: We wouldn't need the court if we could put witnesses on to prove that.

"Mr. Morgan: The whole testimony on that line is objectionable and I think it should be stricken from the record.

"Exam. Trezise: I think we will let him give his opinion on it.

"Mr. Wilkinson: He was asked what his contention was and he has stated what the contention is.

"Exam. Trezise: Yes; we will let that stand.

"Q. (By Mr. Zoll) Now, in I. & S. 5139, the carriers have proposed certain increases in the rates. Is it your contention that the rates from the Illinois mines, as proposed, are improper or unlawful?

"A. Yes, with relationship to the rates from Indiana.

"Q. In view of the fact that you have said that the present rates from the Illinois mines are unduly low, have you in the"

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(p. 1857)

"hitting the wrong button on the machine.

"A. That is right.

"Mr. Bather: While we are on Exhibit 72, I would like to ask Mr. Scott some questions.

"Exam. Trezise: Mr. Bather.

Cross-Examination (Continued).

"Q. (By Mr. Bather) On page 1 of this exhibit, you do advocate an increase in the rates from Indiana mines to Freeport and Rockford, do you not?

"A. Yes, because we have related our rates to

those proposed—in this particular exhibit we have related our rates to those proposed from Southern Illinois. However, the rates shown here whatever rates may be shown here should be related to those from Southern Illinois, if the rates proposed from Southern Illinois are approved. If any other basis is approved, then our rates as suggested here should be changed to correspond with the standard differentials with the Illinois rates.

"Q. And this proposal is based entirely upon your desire to maintain what you say are the standard differentials from Indiana mines?

"A. Yes, sir.

"Q. What consideration did you give to the consumers of coal in making this proposal?

"A. I think a very important consideration.

"Q. You must have, to have advocated an increase of 15 cents a ton."

(p. 1858)

"A. Well, first, now, I will have to answer that last question. I advocate that because the carriers are proposing increases in the rates from Illinois and these rates are based on that. I have no objection to the rates from Illinois remaining where they are and our rates adjusted to give us our rates based on standard differentials.

"Q. Do you subscribe to the proposal of the carriers that 15 cents a ton is justified?

"A. In the rates from—

"Q. The increase of 15 cents per ton in the present rates is justified?

"A. From where, Mr. Bather?

"Q. From Illinois, Indiana, or West Kentucky.

"A. I say the increase of 15 cents per ton as proposed is not justified from all groups because it then does not establish rates in their proper relationship.

"Q. Then why did you propose an increase in the rates from the Brazil-Clinton District to Rockford of from $1.80 to $1.95?

"A. If you will read the heading of this statement, you will notice it says, 'Statement Showing The Rates That would obtain from the Indiana Groups to the Representative Destinations and to a Composite of the Representative Destinations, Based on the Standard Differentials Between the Indiana Groups and the Illinois Groups.' I am not advocating those rates; I am showing what our rates should be based on the rates the carriers are advocating from the Illinois mines."

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(p. 1874)

"ings. That is an obvious and accepted fact. And they are simply interested in an ability to move their coal in order to get those earnings.

"Q. (By Mr. Stadell) Yes, I am familiar with your theory on that, Mr. Scott.

"A. Thank you.

"Q. You stated, as I understood you in your direct testimony, that the present rates from the various Indiana groups to the Northern Illinois points involved are unjust and unreasonable under Section 1 of the Interstate Commerce Act.

"A. I believe that is—yes, that is true.

"Q. And on that basis, those rates being unjust and unreasonable should, in your opinion, be reduced to a just and reasonable basis, should they not?

"A. From Indiana?

"Q. Yes. You said they were unjust and unreasonable. Now, if they are unjust and unreasonable, they should be reduced to a reasonable basis.

"A. My contention is they are unjust and unreasonable, relatively speaking; that is with relation to the rates from Illinois.

"Q. In other words, you make a distinction between relative unreasonableness and intrinsic unreasonableness, is that right?

"A. That is right. My testimony here does not purport to go into the unreasonableness of rates *per*

se. It goes into the unreasonableness of the rates with relationship to the rates from Illinois."

(p. 1875)

"Exam. Trezise: And you are now talking about the present rates or the proposed rates?

"Mr. Stadell: He is talking about the present rates.

"The Witness: I am talking about both.

"Q. (By Mr. Wilkinson) In answer to that question, you are talking about the present rates, are you not, Mr. Scott?

"A. Yes, present rates. I thought he meant—

"Exam. Trezise: All right, present rates.

"Q. (By Mr. Stadell) And you are here, as I understand it, supporting the railroads' 13th Section petition for an increase in the present Illinois rates, intrastate rates, to Northern Illinois. That is your position, isn't it? That is what you said?

"A. No, I don't think that is my position by what I said, Mr. Stadell. I disagree with you.

"Q. Are you opposing that 13th Section petition?

"A. Neither am I opposing it. I am in it for the reason that I want the Commission, in settling these rates under Section 13 of the Act, and as well as under Section 3, to make rates from Indiana which are on their proper level as compared with the rates from Illinois.

"Now, it is not material to me whether the Interstate Commerce Commission arrives at that by increasing the rates from Illinois, by reducing the rates from Indiana or by increasing them partially from one and reducing them partially from the other."

(p. 1876)

"Q. Well, let's take—you say your present rates. Your present rates to these Northern Illinois points are unjust and unreasonable. Let's just take those as a starting point. That is what you said, isn't it?

"A. Yes.

"Mr. Wilkinson: Four times so far.

"Mr. Stadell: All right, the record will show that, Mr. Wilkinson, without your interruption.

"Q. (By Mr. Stadell) Now, what is the present rate—first I will ask you this: Would you say that Rockford, Freeport, and Dixon, Illinois, are the three most important of the representative suspended points involved in this proceeding, from a coal-consuming standpoint?

"A. Rockford and Freeport, and probably Dixon. I believe those are the most important, yes.

"Mr. Trezise: Are you bringing in Beloit too?

"Mr. Stadell: No, I am talking about Northern Illinois.

"Mr. Cardy: That is between Indiana nad Southern Illinois.

"Mr. Stadell: I am not talking about that. I am talking about the importance of them as coal-consuming points.

"Exam. Trezise: Just Northern Illinois.

"Q. (By Mr. Stadell) Now, what is the present rate from the Boonville, Indiana, group and from the Southern Illinois group to Rockford?"